
(2016) 10 KL CK 0065

In the High Court Of Kerala

Case No : Criminal MC. No. 5232 and 5227 of 2016

K.J. Varghese

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 21-10-2016

Acts Referred:

Citation : (2016) 3 MadWNCri 161

Hon'ble Judges : Mr. Sunil Thomas, J.

Bench : Single Bench

Advocate : Sri. T.P. Pradeep Sri. P.K. Sathees Kumar, Advocates, for the Petitioner; Sri. C.K. Suresh, PP, for the Respondent

Final Decision : Disposed Off

Judgement

Mr. Sunil Thomas, J.—Both the above cases were initiated under the provisions of section 138 of the Negotiable Instruments Act. Since the petitioner herein did not appear before the court below, case was entered in long pending register. Subsequently, the dispute between the petitioner and the complainant was settled and the entire amount due was paid to the complainant. Both complaints were withdrawn by Annexure-A order in both CrI.M.C. Subsequently, two separate applications were filed in both the cases evidenced by Annexure-B, to lift the attachment on his property. The Court dismissed it by two separate orders which are produced as Annexure-C. This is under challenge in these proceedings.

2. The premise on which the court below rested its conclusion for dismissing the application for vacating the attachment was that the accused appeared before the Court after two years from the date of attachment. Relying on section 82(3) of the Cr.P.C., it was held that, if an application for attachment was filed within two years from the date of proclamation, Court will be entitled to lift the attachment. However, in the cases at hand, the application to withdraw the case was filed much later. Court below relying on *Moideen v. Sub Inspector of Police* (2010(3) KLT 886), held that, after the expiry of two years from the date of

attachment, accused has no right to get property released by approaching the Court. Learned Chief Judicial Magistrate did not find favour in the view taken in *Vimalben Ajitbhai Patel v. Vatslaben Ashokbhai Patel and Others* (2008(2) KHC 396). In the above case, Supreme Court had held that, once the absconding accused surrenders before the Court and the standing warrants get cancelled, he is no longer an absconder and purpose of attaching the property comes to an end. The Court below held that, facts of the case differed and even in that decision, it was held that, property was to be released subject to the provisions of the Cr.P.C. Supreme Court decision applies to that extent only and hence, the property cannot be released from attachment in this case, it was held. Court further relied on the decision in *Babu M.C. v. State of Kerala and Another* (2011(3) KHC 244), wherein, it was held that merely because the complaint against the accused is withdrawn by the complainant and the accused is consequently acquitted, he cannot after the expiry of two years from the date of attachment of his property, request to lift the attachment and release the property.

3. Accused herein had produced a copy of the proceeding sheet, which initially led to the ordering of steps under sections 82 and 83 of the Cr.P.C. Learned counsel pointed out that, on 11.10.2002, the complainant was present and since non bailable warrant was returned un-executed, the Court on that day, ordered sections 82 and 83 steps. Thereafter, there were few postings and ultimately by order dated 27.12.2002, Court held that it was prima facie satisfied that the accused was absconding and directed to include the case in the LP register. NBW was ordered and District Collector was directed to attach the property of the third accused. Consequently, the property was attached.

4. Learned counsel contended that the above proceedings indicate that there is a complete breach of the provisions of the Statute. It was argued that since the attachment was in violation of the proceedings contemplated under the Statute, there is no effective attachment and hence, the bar under the law, if any, will not apply. It was held by this Court in *Ramakrishnan v. State of Kerala* (2011(1) KLT 842), that section 82 can be initiated when Court has reasons to believe that accused against whom warrant has been issued has either absconded or concealed himself. It was held that, the magistrate cannot initiate proceedings under sections 82 and 83 of the Code simultaneously. The Court clarified that the magistrate could not have initiated proceedings under sections 82 and 83 of the Code simultaneously. For, the proceedings under section 83 Cr.P.C. follows the proceedings under section 82 of the Code as is clear from subsection (1) of section 83. Hence, it was held that the proceeding under section 83 of the Code has to follow the order passed under section 82 of the Code. This was again reiterated in *Babu M.C. v. State of Kerala and Another* (cited supra). In that, this Court held that, a request can be made to the Government after the expiry of two years. A request can be made to the government to release the property. If the Government is satisfied that the plea is correct and that the justice of the case requires that the property be restored, Government can pass appropriate

orders. In *Moideen v. Sub Inspector of Police* (cited supra), it was held that even if the absconder appears and files an application under subsection 3 within a period of two years from the date of attachment, an absconding accused is not entitled to get the property released, unless he satisfies the twin mandatory conditions. The Supreme Court in *Vimalben Ajitbhai Patel v. Vatslaben Ashokbhai Patel and Others* (cited supra) had held that, once the absconding accused surrenders before the Court and the standing warrants cancelled, he is no longer an absconder and purpose of attaching the property comes to an end. Provision under section 82 of the Code were put on the Statute for certain purposes. It was enacted to secure the presence of the accused. Once the said purpose is achieved, the attachment is withdrawn. Even the property under attachment is restored, it was held that since the property comes to an end, it will be released subject to the provisions of the Code. It is true that the above decisions states that it has to be released subject to the provisions of the Code, which may imply that it should be in accordance with the criminal proceedings which provides for application being made within two years. However, the Supreme Court has not made any distinction even in cases where applications were made after two years. However, the proceedings of the court below as mentioned above clearly indicates that on 11.10.2002, NBW was returned un-executed. Hence Court ordered sections 82 and 83 Cr.P.C steps and case posted to 25.11.2002. Thereafter, by order dated 27.12.2002, after examining the witnesses, Court ordered NBW as well as order of attachment of the property of third accused. It is clear that the order to issue sections 82 and 83 Cr.P.C steps were made on 11.10.2002. There was no application of mind to conclude that the petitioner was purposefully absconding to get away from the proceedings. Only after such a clear finding of the court below, could it have ordered section 82 Cr.P.C steps followed by section 83 steps, as clearly stated by this court in *Ramakrishnan v. State of Kerala* (cited supra). Without anything to show that there was an application of mind, the Court arrived at a conclusion that the accused had either absconded or concealed himself. Court could not have ordered sections 83 and 82 steps. Similarly, sections 82 and 83 steps were ordered to be taken and were in fact ordered on 13.12.2002. It appears that attachment order was passed in breach of the provisions of the Code of Criminal Procedure. Hence, the validity of attachment is doubtful. It is evident that the court below has not considered the issue from this angle. There is nothing on record to show that the property was sold in execution. Having regard to these facts, I feel that court below ought to have considered the application in that perspective. I find that the impugned orders are liable to be set aside and matter remanded to the court below for consideration.

In the result, Crl.M.Cs are allowed. Impugned orders in C.M.P.Nos.2119 of 2016 and 2135 of 2016 of the Chief Judicial Magistrate, Kottayam stand set aside. Matters are remanded to the court below to consider both the applications afresh. Both sides shall appear before the court below on 07.11.2016. Both sides shall be heard and applications disposed of within one month from the date of

appearance.